Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

OMAR,

Petitioner,

-vs.-

GLORIDA BABCOCK, CINDY MORALES, BRUCE ROWLEY, and RAUL MORINGLANE, JR.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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The Petitioner, Omar[1] by and through his next friend James P. Kelaher, petitions the Court to review a judgment of the Eleventh Circuit Court of Appeals and to answer the following questions in the affirmative:

QUESTIONS PRESENTED

I. Whether the express conflict between the circuits and several of the states' highest courts on the standard for imposing liability under section 1983 in child abuse cases merits this Court's acceptance of jurisdiction to resolve that conflict in favor of the more protective "professional judgment" standard, or the "deliberate indifference" standard used for prisoner cases?

II. Whether—if the Court applies the professional judgment standard to section 1983 cases brought by abused foster children—the evidence in the light most favorable to Omar satisfied that standard in this case?

III. Whether—if the Court adopts the deliberate indifference standard in section 1983 actions brought by abused foster children—the Eleventh Circuit's application of a purely subjective intent test for meeting the deliberate indifference threshold was erroneous as a matter of law?

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[1] Because the Petitioner Omar was an abused foster child (now age 19), he is identified in the style only by his first name to promote confidentiality. His full name appears in the "Parties to the Proceeding" section of this petition.

PARTIES TO THE PROCEEDING

The parties to this proceeding before this Court are, as identified in the caption of the case, the Petitioner (Appellant below), Omar Demetrius Davis, by and through his next friend James P. Kelaher, and the Respondents (Appellees below), Glorida[2] Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley.

Other individuals who were parties to the proceedings below, but who are not parties in this Court, include the former Defendants, Barbara Holmes, Joan Lindsey, Doris Malave, Joyce Setaro, and Janice Yahnke.

Because this petition is filed by an individual Petitioner, as opposed to a corporation, the provision of Supreme Court Rule 29.6 requiring a Corporate Disclosure Statement is inapplicable.

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[2] Ms. Babcock is also referred to as "Gloria" Babcock in various portions of the record.

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BASIS FOR JURISDICTION

The judgment on review is the final decision of the Eleventh Circuit entered on April 18, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1)(1988).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

AMENDMENT XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

42U.S.C. § 1983 (1979) states:

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. JURISDICTION OF FEDERAL COURTS:

The district court had jurisdiction over this action brought under 42 U.S.C. § 1983 and removed from state court. *See* 28 U.S.C. § 1331 and 28 U.S.C. § 1441.

The summary judgment was entered on August 27, 2004. A notice of appeal was filed on September 22, 2004. The Eleventh Circuit had jurisdiction under 28 U.S.C. § 1291.

B. STATEMENT OF THE FACTS:

The Plaintiff, Omar, is a nineteen-year-old male. Omar and his older brother Jamal came into the custody of the Florida Department of Children and Families ("DCF"), then known as

the Department of Health and Rehabilitative Services[3], in January 1988, when Omar was abandoned by his mother at the age of fourteen months. R.99. Since being taken into DCF custody and declared a dependent child—apart from the period when he was in the abusive foster and adoptive placement with Joanne Davis—Omar has been a ward of the State shuttled between institutional placements and temporary shelters throughout his entire life. R.115-11.

From November 1989 when he was not quite three years old, until June 1993 when he was six, Omar lived with Joanne Davis, with whom DCF employees including the Defendants had placed him. Omar suffered egregious abuse there, being beaten with hammers and high-heeled shoes; whipped with a looped belt severely enough to require hospital treatment; deprived of food and water for up to three days at a time; forced to eat his own feces; tied to a bedpost all night; locked in an animal cage; and more. As noted by the district court, "Defendants do not dispute that Plaintiff was the victim of severe abuse at the hands of Davis." *Omar III* at 1290.

Omar was initially housed in the "Bailey Emergency Shelter," until May 1988. In 1989, Omar's parents' parental rights were terminated. R.18-9; R.43-6. In November 1989, when Omar had reached three years of age, he was moved to the house of foster parent Joanne Davis.

DCF policies include the safety requirement that an Adoptive Home Study be performed before a child may be placed in a home for adoption. R.99-21, 23. No such study was performed in connection with Joanne Davis' adoption of Omar and Jamal. R.80-42-43.

There was an adoptive home study performed on August 4, 1988 prior to the planned adoption of Melissa, a girl. R.99-57.

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[3] For consistency that department will be referred to as "DCF" even when discussing events which occurred under its former name.

In February 1989, an addendum to the home study was prepared which related to the adoption of another girl named Vernetta. R.99-58.

The planned adoption of Melissa was not finalized. Davis requested that Melissa be removed from her home, as Davis could not control her. R.76-Ex.C (Bates 2648); R.79-51. Davis did not adopt Vernetta either. R.115-5.

Notwithstanding the lack of a home study in connection with Davis' adoption of Omar and his brother Jamal, those boys, along with an unrelated girl named Stephanie (later renamed Keisha) were approved for adoptive placement. R.115-5. Defendant/Respondent Bruce Rowley, the Adoptive Unit Supervisor who supervised the unit handling Omar's case, signed the Consent to Adoption of Omar and Jamal on behalf of DCF. Referring to the prior home study report done for the aborted adoptions of the girls, Rowley's form misleadingly stated: "a social study of the home of Joann Davis was made before said children were placed." R.79-45.

Defendant Rowley could not recall reviewing the 1988 report prepared for Melissa's placement with Davis prior to signing the Consent to Adoption of Omar. R.79-52. That 1988 home study report contained the following statement which indicated that Davis herself knew that she could not provide the level of care required by a very young child like three-year-old Omar: "Joann states she has experience taking care of younger children and does not wish to parent a younger child. Because of her age, she wishes to adopt an older child." R.76-19.

In addition to the lack of a required, child-specific Adoptive Home Study, there was evidence reflecting a lack of the minimal monthly caseworker visits after Omar was placed there and before the adoption was finalized. R.80-51, 61. Defendant/Respondent Glorida Babcock, the caseworker in the Adoptions Unit assigned to Omar's case, kept logged notes of some home visits to the Davis house for a period before the adoption was finalized. However, there is no record that she

performed a required home visit between November 28, 1990 and January 18, 2001. R.80-64. It was during that interval that doctors at Orlando Regional Medical Center's Arnold Palmer Hospital documented the new "looped lesions" and old signs of abuse on Omar's body which led to the first Abuse Hotline report. Ms. Babcock speculated that perhaps she did make such a visit, but did not note it. R.80-110.

While residing with Joanne Davis, evidence came to light which indicated that Omar had been subject to severe abuse. R.43-6. Omar, on more than one occasion, was brutally beaten with a belt, cord or other object by someone while in the pre-adoptive placement with Davis. R.93-87. It was uncontradicted that Davis either inflicted that abuse herself, or at the very least did not protect Omar from being abused by a sibling or someone else. R.93-53.

Omar was hospitalized several times during the fifteen-month interval between being moved to the Davis house in November 1989 and the adoption in February 1991. R.43-7. In March and December of 1990, Omar was hospitalized for seizures. R.76-36, 37. In a note made more than a month before the adoption, Defendant Babcock stated: "Omar continues to have seizures and the origin remains unknown."R.76-54.

The hospital record from December 21, 1990 reflects that he was admitted for treatment of pneumonia, and that "belt marks on his back were discovered which lead Dr. Villadiego to be suspicious of abuse." R.70-19. Davis claimed to be unaware of those marks until confronted by the hospital staff about them, and she "was unable to give an explanation of the marks at the time of admission." Three days later, Davis offered the explanation about another child in the house having struck Omar with an electrical cord. *Id.*

Dr. Fahy examined Omar's back, "documented the loop marks," and stated that Davis' claimed lack of knowledge of the marks prior to the physician visit was "worrisome." Dr.

Fahy also suggested that DCF examine the electrical cord allegedly used by the foster sibling to see if the history provided by Davis could be consistent with the visible injuries. *Id.*

Those belt marks were "looped," which is "one of the signs . . . specifically addressed in [DCF] child protection training" as an indication of child abuse, according to the deposition of Child Protective Investigator Karen Loomis; the looping of the belt indicates that the injuries were "inflicted." R.93-87.

Investigator Loomis found that "Omar, Keisha and Jamal Davis have been the victims of ongoing abuse from their adoptive mother since at least December of 1990 when belt marks were discovered on four-year-old Omar . . . ." R.93-53, 54. Ms. Loomis found that Ms. Davis had forced Omar to eat his own feces when he soiled his pants, and recommended that the "case will be closed, proposed confirmed for the maltreatments of confinement, bizarre punishment, medical neglect, other physical injury, inadequate supervision, other mental injuries, conditions hazardous to health, excess corporal punishment and beatings." R.93-50. She testified the nature of the abuse made the case "especially memorable" among her many investigations over her years with DCF. R.93-98.

Karis McDuffie, another child adopted by Davis, corroborated the abuse perpetrated by Davis, including depriving the children of food, denying Omar water, and hitting Omar with various objects, including a belt, a shoe and a hammer. R.90-2.

Ms. McDuffie linked the "seizures" for which Omar was hospitalized to the abuse Davis was inflicting upon him during the months prior to the adoption. The affidavit states: "I don't think he went to the hospital for 'seizures'; she made him have these seizures." R.90-2. Ms. McDuffie stated: "A lot of times, she did not give Omar water or anything else to drink. . . . Omar had to be taken to the hospital several times because Joanne Davis would not let him have anything to drink and he would get dehydrated." R.90-1-2.

The facts pertinent to the individual Defendants include the following:

Raul Moringlane:

The Defendant Raul Moringlane was employed by DCF as a Child Protective Investigator assigned to investigate the report of Omar's abuse in December 1990. R.78-5. The district court made the following findings concerning the sufficiency of evidence that Moringlane had actual knowledge of abuse to Plaintiff by Davis:

> Based on the record, the Court finds that Defendant Moringlane did have actual knowledge of a risk of child abuse to Plaintiff by Davis. Moringlane received in some manner a report of suspected child abuse of Plaintiff in December of 1990. From the contents of the written report, Moringlane knew that Plaintiff had loop marks on his back and buttocks. Therefore, Moringlane had actual knowledge that Plaintiff could have suffered abuse from a third person, including Davis.

R.115-30.

Cindy Morales

The Defendant Cindy Morales was supervisor of caseworker Glorida Babcock in the DCF adoptions unit, when Omar was placed in the Davis house. R.99-32. Ms. Morales testified that a separate home study must be done pursuant to DCF policy for each prospective adoptive child. R.99-21. The responsibility for performing that home study is initially that of the unit counselor assigned to the case. R.99-42. However, Ms. Morales agreed that if the unit counselor failed to perform the home study, the unit supervisor bore ultimate responsibility for that failure. R.99-43. She agreed that such a study is important to the safety of the adoptive child. R.99-23.

Ms. Morales served as chairperson of an Administrative Review Conference on the Plaintiff's case which was held on

September 12, 1990. R.99-38. That meeting, like all meetings at DCF regarding children, had as a priority the goal of making sure that the children were safe. R.99-39. By the time of that conference, Omar had been hospitalized several times for seizures and dehydration.

Bruce Rowley

Mr. Rowley signed reports during 1990 on behalf of the adoptions supervisor, Ms. Morales, which documented Omar's hospitalization for seizures. R.79-55. He attended an Administrative Review conference on September 12, 1990 at which the topics included Omar's medical history of seizures. R.79-55-59. Another report he signed on November 28, 1990 documents Omar's seizures. R.79-60.

Rowley also would have been aware of the December 1990 abuse report, under usual DCF procedures to inform those involved, as established by the affidavit of Linda Radigan, former DCF Assistant Secretary. R.91-11, 12. DCF records from June 23, 1993 stated: "Omar in hospital way too much for dehydration [in] 1990, drinking out of the toilet when she wouldn't let him have anything to drink." R.79-69. Mr. Rowley testified that he "probably did" have knowledge about those hospitalizations for seizures and dehydration when he signed the Consent for Adoption. R.79-70. When shown the records of Omar's six hospitalizations in 1990 and 1991 (including those mentioning the belt marks and possible child abuse), all of which were prior to the date he signed the Consent to Adoption, Mr. Rowley stated: "The medical records that were in the file I would have reviewed." R.79-88.

Glorida Babcock

Ms. Babcock reviewed and spoke with doctors about the medical records that documented the looped belt marks on Omar's back and buttocks in December 1990 which led to the Child Protection Team report. R.80-113, 114.

Further evidence that Defendant Babcock knew about Omar's abuse, or at least the circumstances causing him

injuries and illnesses requiring hospital treatment as a result of neglect, is contained in the affidavit of Linda Radigan, former Assistant Secretary of DCF. Ms. Radigan, whose duties during her ten-year employment with DCF included being responsible for the Florida foster care system, stated:

> 22. Further, consistent with required practice and procedure, Defendant Moringlane testified that although he has no specific recollection about the investigation he did, he is certain that he followed procedure and proper practice in letting the ARS personnel including the then-counselor (Babcock) and the then-supervisor (Rowley) know about the abuse allegations. Defendant Morales also admitted in her deposition (p. 73) that she was certain that protective investigators approaching an investigation ". . . would be in communication with whoever is involved in the abuse, especially services." They would certainly notify those other people who were involved so that everyone involved in the case would have that information. . . ."

R.91-11-12.[4]

Linda Radigan's affidavit contained numerous examples of the failure of the Defendants to use professional judgment in connection with their placement of Omar in the Davis house and their failure to protect him from the risk of harm that was obvious in that house. "Contrary to requirements and good practices" applicable to DCF foster care and adoption personnel, the Defendants did not exercise judgment in

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[4]Although the district court struck six paragraphs of Ms. Radigan's affidavit (on the ground that her opinions that the Defendants were deliberately indifferent to the risk to Omar were legal conclusions and impermissible comments on the mental state of others), the quoted portions were not stricken.

important areas including "no exploration of the reasons for the disruption and dissolution of the prior adoption" of Melissa; "no assessment of Joann[Davis]'s financial means to care for three children, despite [evidence of] financial hardship;" failure to make any "assessment of Joann's work requirements," in disregard of "requirements established to protect the safety of the children." R.91-6. The Defendants failed to utilize their judgment as professionals to make "any evaluation of the special needs of each of these three children;" and the result of such failures to use professional judgment "increased the risks of harm to all of the children put into the Davis house that Fall, including Omar." *Id.* at pp. 6-7.

Ms. Radigan's affidavit also establishes that the Defendants did not use their professional judgment in dealing with the visible injuries and illnesses revealed when Omar was hospitalized on various occasions after being beaten and starved. *Id.* at 12-14. Instead, the Defendants ignored their duties as professionals to make the sort of analyses and assessments required under DCF practices, resulting in further injury—physical, mental and emotional—being inflicted on the helpless child.

C. COURSE OF PROCEEDINGS AND DISPOSITIONS:

This lawsuit was filed in September of 2002 in a Florida state court of general jurisdiction in Orange County. R.2. That complaint named nine Defendants, Joan Lindsey, Glorida Babcock, Barbara Holmes, Doris Malave, Cindy Morales, Raul Morninglane, Jr., Bruce Rowley, Joyce Setaro, and Janice Yahnke. R.2-1. The Defendants filed a notice of removal and the case was removed to the U.S. District Court for the Middle District of Florida. R.1-1.

The Defendants filed a motion to dismiss Plaintiff's complaint, raising the doctrine of qualified immunity, alleging that the complaint failed to meet the heightened pleading

requirement applicable in the Eleventh Circuit to a § 1983 civil rights claim against individual defendants[5], asserting that the complaint failed to state a cause of action upon which relief can be granted, and raising lack of subject matter jurisdiction. R.2-1-3. That motion was mooted by the Plaintiff's filing of an amended complaint, removing claims against Joyce Setaro. R.18. The Defendants then filed a motion to dismiss the Plaintiff's amended complaint.

That motion was denied on January 14, 2003. *Omar v. Lindsey*, 243 F. Supp. 2d 1339 (M.D. Fla. 2003). Applying the procedure for addressing the qualified immunity defense set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the district court first found that there was a constitutional violation alleged in the amended complaint similar to that in *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987):

> According to the complaint, Plaintiff was brutalized with, inter alia, beatings, persistent malnourishment, dehydration, neglected illness, mace, and being bound. The depravity of this abuse plainly brings Plaintiff's case within the ambit of the *Taylor* doctrine, and the Court concludes, therefore, that the complaint satisfactorily pleads a fourteenth amendment violation.

Omar I, 243 F. Supp. 2d at 1343.

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[5] Thirteen years after this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993), the Eleventh Circuit continues to recognize such a standard in cases against individual defendants entitled to qualified immunity. *See Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004)(rejecting heightened pleading standard in cases against entities not entitled to raise qualified immunity defense, but reaffirming that standard in cases against individuals).

The district court next addressed the sufficiency of the Plaintiff's allegations that the Defendants were deliberately indifferent to known risks. The district court judge found that "Plaintiff's complaint does not allege mere negligence. . .[but] adequately pleads the elements of deliberate indifference as enunciated by *McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999)." 243 F. Supp. 2d at 1344.

Next, the district court turned to the portion of the *Saucier* analysis which involves the question whether the Plaintiff's constitutional right which was denied by Defendants' conduct was "clearly established." Following this Court's holding in *Hope v. Pelzer,* 122 S. Ct. 2508 (2002), that a right may be clearly established even though no prior court decision involved the exact same factual circumstances, the district court held that Omar's rights involved in this case were clearly established by *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

Next, the district judge addressed the "heightened pleading requirements" which exist in the Eleventh Circuit in cases brought under section 1983. After addressing the tension between customary federal notice pleading standards with the need to protect potential defendants in section 1983 cases, the district court concluded, "[u]pon careful consideration," that the Amended Complaint satisfied the heightened pleading standard, in that "the Court was able to ascertain the nature of each claim and evaluate whether its allegations were sufficient to overcome the qualified immunity threshold." *Id.* at 1346.

Finally, the district court considered the Defendants' argument that Omar's claims were barred by the statute of limitations. The motion was denied on that ground. *Id.* at 1347.

The Defendants perfected an appeal from the order denying their motion to dismiss. The Eleventh Circuit swiftly affirmed that order, holding that the Complaint sufficiently alleged constitutional violations under section 1983 actionable against the Defendants, and holding: "The gravamen of the allegations

is that these individuals knowingly and deliberately ignored the physical, mental and emotional harm being caused this child by the intentional infliction of known cruel and unusual punishment which shocks the conscience of any reasonable person." *Omar II*, 334 F.3d 1246, 1246 (11th Cir. 2003). The Eleventh Circuit court adopted the reasons set forth in the district court's opinion in *Omar I*.

Following remand to the district court, the Defendants filed a series of motions for summary judgment. R.59, 68, 71, 73, 75, and 77. The Plaintiff filed his own motion for partial summary judgment on the statute of limitations defense. R.109. By Joint Stipulation and Agreed order, the Plaintiff dropped his claims against Defendants Lindsey, Holmes, Malave, and Yahnke.

Judge Fawcett, in an order entered on August 27, 2004, struck much of the affidavit of Plaintiff's expert, Linda Radigan, and granted summary judgment for the Defendants on the qualified immunity issue. *Omar IV*. In its order granting summary judgment to the Defendants on qualified immunity grounds, the district court concluded that there was insufficient direct or circumstantial evidence that the Defendants knew that Omar was being abused, or deliberately disregarded a known risk of abuse by Davis, or at the hands of Davis, prior to the date his adoption by Davis was finalized. R.115-32, 34, 39, 45. Plaintiff timely filed an appeal on September 22, 2004. R.117.

On April 18, 2006, the Eleventh Circuit affirmed that district court's order granting summary judgment on qualified immunity to the Defendants. *Omar V*.

The court's decision began with an analysis of the knowledge element of deliberate indifference, which is the subject of this petition.

> The record contains no evidence that appellees knew of a risk of serious harm to Omar. To be deliberately indifferent, an official must not

> only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but ***the official must also draw the inference that the plaintiff is likely to be harmed***. See *Ray*, 370 at 1083 (citing *Farmer v. Brennan*, 511 U.S. 825 (1994)). The record contains evidence that, prior to Omar's adoption, he had some documented illnesses, he displayed evidence of psychological problems, and on one occasion, his doctor discovered loop marks on his body. ***There is no evidence, however, that any of the appellees actually drew the inference that these facts meant Omar was being abused by Davis***.

Omar V, 2006 U.S. App. LEXIS 9704 at *13. The court did not address Plaintiff's argument that the Defendants were deliberately indifferent to a known risk of harm arising from Davis' neglect of Omar, which allowed someone else to beat the child and otherwise harm him.

Next, the court found that "there is no evidence that any of the appellees' failure to conclude that Omar was being abused was anything other than an unfortunate miscue." *Id.* at *14. The Eleventh Circuit seemingly contradicted its own findings of no evidence while applying the deliberate indifference test. The court found that "on December 21, 1990, Omar was admitted to Arnold Palmer Hospital for treatment of pneumonia. Omar was examined by Dr. Villadiego, who discovered a series of loop marks on Omar's body. ***Dr. Villadiego was concerned that these marks might have resulted from abuse, and he informed DCF*** of his discovery." *Id.* at *7 (emphasis added).

ARGUMENT

I.

THIS COURT SHOULD RESOLVE THE EXPRESS CONFLICT BETWEEN THE CIRCUITS AND SEVERAL OF THE STATES' HIGHEST COURTS AND APPLY THE PROFESSIONAL JUDGMENT STANDARD IN SECTION 1983 CHILD ABUSE CASES

A. The Circuits and State Supreme Courts are Split on the Issue:

The Eleventh Circuit granted summary judgment in favor of the Defendant child welfare workers—who placed Omar in the abusive foster home and left him there to be horribly mistreated—applying the standard used in cases brought by convicted felons claiming Eighth Amendment violations against prison officials: "deliberate indifference." That standard is exceedingly difficult to satisfy because it incorporates a subjective mental state requirement requiring the plaintiff to prove facts that defendants invariably deny: actual knowledge that the foster child is likely to be harmed. "To be deliberately indifferent, an official must not only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but the official must also ***draw the inference*** that the plaintiff is likely to be harmed." *Omar V* at * 13. (emphasis added).

Several other circuits likewise apply the deliberate indifference standard in § 1983 cases brought by abused foster children against child welfare workers. *Jordan v. Jackson*, 15 F.3d 333, 341 (4th Cir. 1994); *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Doe v. New York City Dep't of Social Servs.*, 649 F.2d 134 (2d Cir. 1981). Still other circuits apply a standard borrowed from cases brought by involuntarily committed mental patients: the "professional

judgment" standard. *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d 883, 893-94 (10th Cir. 1992); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990).

There also is a serious split between the highest courts of several states concerning the appropriate standard to employ in 1983 cases brought by foster children. In *Braam v. State of Washington*, 81 P.3d 851 (Wash. 2003), the highest court of the State of Washington rejected the deliberate indifference standard in favor of the professional judgment standard. Likewise, in *Kara B. v. Dane County*, 555 N.W.2d 630 (Wisc. 1996), the Wisconsin Supreme Court rejected the deliberate indifference standard in favor of the professional judgment standard.

The legal scholars who have written on the issue understand the difference between the two standards:

> Unfortunately, in the absence of a Supreme Court ruling on the subject, a circuit split has developed regarding the level of state apathy that a plaintiff foster child must demonstrate before the abuse he suffered while in custody rises to the level of an unconstitutional violation of his right to safety. Some circuits, by adopting a "deliberate indifference" standard, have read the Constitution to provide a state with no legal duty to keep its foster homes safer than it keeps its prisons. Yet, by Supreme Court precedent, these "deliberate indifference" circuits must apply a much higher "professional judgment" standard of care to state-run institutions for mentally retarded adults. Other circuits have, more wisely, applied this more rigorous "professional judgment" standard to foster care.

Brendan P. Kearse, *Abused Again: Competing Constitutional Standards for the State's Duty to Protect Foster Children*, 29 Colum. J.L. & Soc. Probs. 385, 386-87 (1996)(hereinafter "*Competing Constitutional Standards*").

This Court should grant certiorari and address the merits of which standard applies in cases of abused foster children suing child welfare workers under § 1983.

B. Effects of *DeShaney*, *Estelle* and *Youngberg*:

The current, confused state of the law applicable to claims by abused foster children results from the lower courts' efforts to apply principles articulated by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). In *DeShaney*, this Court rejected a child's claim against the state for failing to protect him from abuse by his father, holding that the state's duty extended only to persons kept in state custody. *Id.* at 199-201. The Court relied heavily on two cases to address the parameters of the duty state actors owe to those in state custody: one case involving a convicted prisoner and another case involving an involuntarily committed mental patient:

> In *Estelle* v. *Gamble*, 429 U.S. 97 (1976), we recognized that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth Amendment's Due Process Clause, *Robinson* v. *California*, 370 U.S. 660 (1962), requires the State to provide adequate medical care to incarcerated prisoners. 429 U.S. at 103-104. We reasoned that because the prisoner is unable "'by reason of the deprivation of his liberty [to] care for himself,'" it is only "'just'" that the State be required to care for him. *Ibid.*, quoting *Spicer*

v. *Williamson*, 191 N.C. 487, 490, 132 S. E. 291, 293 (1926).

* * *

In *Youngberg* v. *Romeo*, 457 U.S. 307 (1982), we extended this analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed mental patients with such services as are necessary to ensure their "reasonable safety" from themselves and others. *Id.*, at 314-325; see *id.*, at 315, 324 (dicta indicating that the State is also obligated to provide such individuals with "adequate food, shelter, clothing, and medical care"). As we explained: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional [under the Due Process Clause] to confine the involuntarily committed--who may not be punished at all -- in unsafe conditions." *Id.*, at 315-316 . . . .

Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. See *Youngberg* v. *Romeo, supra*, at 317 ("When a person is institutionalized -- and wholly dependent on the State[,] . . . a duty to provide certain services and care does exist").

489 U.S. at 198-200(footnotes deleted).

In the years since *DeShaney*, several of the lower courts—including the Eleventh Circuit--have lost sight of the fundamental differences between injured prisoner cases brought under the Eighth Amendment, and Fourteenth Amendment cases involving due process violations of the right to personal safety of innocent plaintiffs like the mental patient in *Youngberg* and helpless foster children. One commentator on the split between the circuits has described the problem caused by the confusion of the two categories of cases as follows:

> While both *Estelle* and *Youngberg* established for the state an affirmative duty to protect individuals held in state custody, the two cases established different minimum levels of care. The result is a circuit split regarding which standard of care to apply in the context of foster children—the relatively lax standard applicable to prisoners, or the more rigorous standard applicable to involuntarily committed mental patients. Lower courts have not found it difficult to decide that indeed foster care is "sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect," but they have been vexed by the question of what standard of liability this suggests. Penal incarceration gives rise to an affirmative duty to protect which is attended by a standard of liability known as "deliberate indifference." Institutionalization of mental patients gives rise to a similar affirmative duty to protect attended by a higher standard of liability -- the "professional judgment" standard. Having decided that foster care is custody under the *DeShaney* analysis, lower courts were then left unguided when choosing

which standard of care to apply: "deliberate indifference" or "professional judgment." ***Oddly, most of these courts' decisions are conspicuously devoid of an acknowledgment that they even had a choice of two possible standards or that disagreement exists among the courts.***

Which standard a circuit adopts is critical because, in reality, the enforceability of a right in large part determines the nature of the right itself. The right to safekeeping in custody could be rendered meaningless if, for example, plaintiffs were required to show that the state had in essence a mens rea of intentional disregard of the right to safety. The right to safekeeping in custody would then be effectively unenforceable.

Thus, the level of safety for foster children mandated by the Constitution depends as a practical matter on the standard of liability to which the state is held when a child sues for abuse. ***Foster children residing in a circuit that has found foster care more analogous to incarceration discover that the Constitution guarantees them a very minimal level of safety, while foster children residing in a circuit that has found foster care more analogous to involuntary institutionalization discover that the same Constitution guarantees them a much higher level of safety.*** This is because Estelle, a prisoners' rights case, was based on the Eighth Amendment and will not hold the state responsible for poor oversight of its foster homes unless the plaintiff foster child can show that the state actor had a highly

> culpable state of mind. This creates a weak duty to protect foster children. In contrast, *Youngberg*, a case involving the abuse of an involuntarily committed mental patient, found that the standard of liability was based on substantive due process analysis under the Fourteenth Amendment, and thus it set a much lower state-of-mind requirement. This creates a strong duty to protect children.

Competing Constitutional Standards, supra, at 392-94 (emphasis added and footnotes deleted).

C. Public Policy Favors Adoption of Professional Judgment Standard in Child Abuse Cases:

The split between the circuits has continued to widen as the years pass by. Legal scholars have been calling for this Court to address the conflicting standards that render it nearly impossible for an abused foster child to recover against a state child welfare worker: "Since the *DeShaney* decision in 1989, the Supreme Court has denied certiorari in cases brought by foster children to enforce constitutional rights. The continued conflict between the circuits, and the perpetuation of legal discourse addressing the issue of state agency liability for violation of foster children's constitutional right to safety, advance the need for resolution by the Supreme Court." Christine M. Dine, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children's Right to Safety,* 38 Cal. W. L. Rev. 507, 515 (Spring 2002)(footnotes deleted).

Under the professional judgment standard, in order to recover in a section 1983 action, the Plaintiff must prove that the defendant's action was such a "substantial departure from accepted professional judgment, practice, or standards as to

demonstrate that the person responsible actually did not base the decision on such a judgment. *Youngberg*, 457 U.S. at 323. That is the appropriate standard to apply where a helpless foster child such as Omar is at the mercy of state employees purporting to apply standards of professionalism in the field of child welfare to provide for their safety. The "deliberate indifference" test appropriate to preserve the more limited Eighth Amendment rights of convicted felons is not appropriate to protect the rights of dependent foster children. Public policy demands that the courts protect these children by adopting a standard requiring child welfare workers to exercise professional judgment, as opposed to immunizing them unless they are deliberately indifferent.

The Supreme Court of Washington in addressing this issue has held as follows:

> Accordingly, we hold that "deliberate indifference" is not well suited for analyzing the claims of the class. Foster children are entitled to a high standard. *Accord, Brian A.*, 149 F. Supp. 2d at 953-54. Something more than refraining from indifferent action is required to protect the innocents.
>
> The plaintiffs argue for the professional judgment standard of *Youngberg*, 457 U.S. at 323. . . . We find compelling reasoning of the Wisconsin Supreme Court, which found "that those entrusted with the task of ensuring that children are placed in a safe and secure foster home owe a constitutional duty that is determined by a *professional judgment standard*." *Kara B.*, 205 Wis. 2d at 158 (emphasis added). We agree. Foster children, because of circumstances usually far beyond their control, have been removed from their

> parents by the State for the child's own best interest. More often these children are victims, not perpetrators. ***Foster children need both care and protection. The State owes these children more than benign indifference and must affirmatively take reasonable steps to provide for their care and safety.***
>
> * * *
>
> We hold that the appropriate culpability standard is the professional judgment standard, i.e., the exercise of professional judgment made in accord with accepted professional standards or practice. "

Braam, 81 P.3d at 859 (emphasis added).

The same public policy considerations underlay the Supreme Court of Wisconsin's decision to adopt the professional judgment standard in section 1983 cases brought by abused foster children in *Kara B. v. Dane County*, 555 N.W.2d 630 (Wisc. 1996). That court adopted the reasoning of this Court in the *Youngberg* case to distinguish the situation of a claim based on violations of substantive due process rights to Eighth Amendment claims brought by convicted prisoners:

> We agree that *Youngberg* is more closely analogous to claims involving foster children than *Estelle*. We also find compelling the argument that ***foster children should be entitled to greater rights than prisoners***. Accordingly, we conclude that the duty of public officials to provide foster children with a safe and secure placement is based on a professional judgment standard.

Id. at 638 (emphasis added).

The Tenth Circuit likewise noted the public policy considerations underlying providing greater protection to helpless foster children than to prisoners in its decision in *Yvonne L. v. New Mexico Department of Human Services*, 959 F.2d 883 (10th Cir. 1992). That court held as follows:

> The compelling appeal of the argument for the professional judgment standard is that foster children, like involuntarily committed patients are 'entitled to more considerate treatment and conditions' than criminals. *Youngberg*, 457 U.S. at 321-22. . . . These are young children, taken by the state from their parents for reasons that generally are not the fault of the children themselves. The officials who place the children are acting in the place of the parents.

Id. at 895. The Seventh Circuit also applies the professional judgment test in foster child cases. *K.H. ex-rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990). Other lower courts also have rejected the deliberate indifference standard in foster children cases, reflecting the public policy of providing greater protection to helpless children in state custody than to convicted felons. *E.g. Neiberger v. Hawkins*, 239 F. Supp. 2d 1140, 1149 (D. Colo. 2002); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996 (D.D.C. 1991).

This Court should recognize the stronger public policy considerations in favor of a standard that protects foster children and adopt as a nationwide standard the professional judgment standard. Otherwise, helpless children will be treated worse than a convicted killer.

II.

IF THE PROFESSIONAL JUDGMENT STANDARD APPLIES TO SECTION 1983 CASES BROUGHT BY ABUSED FOSTER CHILDREN, THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF SATISFIED THE STANDARD, SO REVERSAL IS REQUIRED

The affidavit executed by the former head of DCF's foster care program, Linda Radigan, when taken in the light most favorable to the Plaintiff, creates a genuine issue of material fact as to whether the Defendants failed to meet the professional judgment standard. "Professional judgment" requires a child welfare worker to apply his or her education and training and to assess the factual situation at hand, in light of the applicable DCF policies and procedures. Linda Radigan's affidavit testimony that the Defendants' response to the situation was "contrary to requirements and good practices" applicable to DCF personnel is evidence that the Defendants did not exercise their professional judgment.

That affidavit establishes a failure to exercise the judgment of a professional in the Defendants' failure to "explor[e] . . . the reasons for the disruption and dissolution of the prior adoption" of Melissa; their failure to "assess[] . . . Joann [Davis]'s financial means to care for three children, despite [evidence of] financial hardship;" and their failure to make any "assessment of Joann's work requirements," in disregard of "requirements established to protect the safety of the children." R.91-6. The Defendants failed to utilize their judgment as professionals to make "any evaluation of the special needs of each of these three children;" and the result of such failures to use professional judgment "increased the risks of harm to all of the children put into the Davis house that Fall, including Omar." *Id.* at pp. 6-7.

Further, Ms. Radigan's affidavit establishes that the Defendants did not use their professional judgment in dealing with the visible injuries and illnesses revealed when Omar was hospitalized on various occasions after being beaten and starved. *Id.* at 12-14. Instead, the Defendants ignored their duties as professionals to make the sorts of analyses and assessments required under DCF practices, resulting in further injury—physical, mental and emotional—being inflicted on the helpless child. The evidence met the standard for overcoming qualified immunity that this Court should adopt in section 1983 cases filed by abused and neglected foster children. Therefore, the Eleventh Circuit's judgment should be reversed.

III.

IF THIS COURT DETERMINES THAT THE DELIBERATE INDIFFERENCE STANDARD APPLIES TO FOSTER CHILDREN'S CASES, DELIBERATE INDIFFERENCE SHOULD BE DEFINED USING AN OBJECTIVE STANDARD

Even if this Court should agree with those circuits that apply the deliberate indifference standard to section 1983 cases brought by foster children, this Court should reverse the Eleventh Circuit's decision on the ground that deliberate indifference was incorrectly defined by that court. Instead of applying a standard that allows state actors to avoid liability for constitutional violations by simply denying subjective awareness of the likelihood of harm to the plaintiff, this Court should define deliberate indifference to incorporate an objective standard applicable to others within the defendant's area of expertise. If no reasonable child welfare worker in the position of the defendants could have failed to recognize the risk of harm to the plaintiff in a given foster home situation, summary judgment should be denied even though the defendant

claims that she or he did not subjectively infer that the risk of harm was likely.

In *Estelle v. Gamble*, 429 U.S. 97 (1976), this Court held that prison officials who show deliberate indifference to a prisoner's serious illness or injury violate the Eighth Amendment's prohibition against the infliction of cruel and unusual punishment. Such a transgression gives rise to an action under 42 U.S.C. § 1983. This principle has been adopted and well established by the Eleventh Circuit. *See Williams v. Bennett*, 689 F.2d 1370 (11th Cir. 1982).

One of the early cases under section 1983 in which the mental state issue was addressed is the Second Circuit's decision in *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981). That case, like others in the developing area of law, started by analogizing the Eighth Amendment prisoner abuse cases to the foster care situation. Unfortunately, the analogy was taken too far by the Eleventh Circuit in its development of the law in this area.

In *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), the Eleventh Circuit relied on the *Doe* case in establishing a section 1983 cause of action for children placed in abusive homes through the fault of foster care or adoptive services workers. Although the deliberate indifference standard in *Taylor* was borrowed from *Doe*, it appears that a more stringent application of the standard evolved in the Eleventh Circuit, apparently resulting from the proliferation of abused prisoner cases.

This heightening of the deliberate indifference mental state to the present requirement that a defendant consciously draw the inference that a child is going to be harmed is largely due to this Court's decision in *Farmer v. Brennan,* 511 U.S. 825 (1970) expounding on the *Estelle* deliberate indifference standard and characterizing it as a subjective test. To meet this standard, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw that inference." *Farmer*,at

837. Making a showing that an official actually knew of past abuse to a foster child, and has actually drawn the inference that a risk of further serious harm exists is often fatal to a section 1983 claim of Omar's sort.

In *Ray v. Foltz* and *McElligot v. Foley*, the Eleventh Circuit states that the test for deliberate indifference includes an objective element. "To establish deliberate indifference, plaintiffs must be able to allege (and prove at trial) that the defendant (1) was **objectively** aware of a risk of serious harm; (2) recklessly disregarded the risk of harm; and (3) this conduct was more than merely negligent. *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)." *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004). However, the Eleventh Circuit actually uses the subjective test described by *Farmer*.

The deliberate indifference standard—if it is employed in child abuse cases—should be defined using an objective test of recklessness, rather than requiring proof that the defendant was certain that harm was inevitable. The court should consider objective factors where the obviousness of the likelihood of harm is abundantly clear, as it was here.[6] *Cf. Whitley v. Albers*, 475 U.S. 312, 320 (1986); *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)(recognizing higher standard requiring intent to harm in cases requiring hurried judgments and need to restore or keep order).

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[6] Petitioner notes that the district court in *Omar IV* found "that Defendant Moringlane did have actual knowledge of a risk of child abuse to Plaintiff by Davis." R. 115-30. A child care professional armed with such "actual knowledge" should not be protected by the virtually-impossible requirement of proving that the defendant subjectively knew that further harm was likely to occur. Once the defendant denies drawing such an inference, all that is left is objective evidence. That should be enough to satisfy the test where the lives and safety of helpless foster children are at stake.

Foster care workers do have the ability to make unhurried and reflective judgments about placements. Moreover, they are not confronted with the need to maintain prison or public order in the face of competing obligations.

It was of some note to the *Farmer* Court that a prisoner could seek relief from a substantial risk of serious harm through an injunction. Children placed in foster care do not share this luxury. They are vulnerable, immature, and without advocates outside of the government officials who investigate and place them. The court rejected the argument that a subjective deliberate indifference test will unjustly require prisoners to suffer physical injury before obtaining court-ordered relief of objectively inhumane conditions. In the context of prisoners, the court appropriately rejected petitioner's argument on the grounds that "one does not have to await the consummation of threatened injury to obtain preventative relief." *Farmer*, at 845. This cannot be analogous to children in foster care systems for obvious reasons, particularly in this case where Omar was three years old at placement.

Also, the standard for prisoners must give due regard to "the unenviable task of keeping dangerous men in safe custody under humane conditions." Foster care placement or adoptive placement does not share this extra consideration of danger and keeping order in the prisons. Likewise, the State is not dealing with convicted criminals. These children are innocent.

The facts in this case satisfy the level of recklessness required to demonstrate objective deliberate indifference. Upon placement with Davis, Omar began having seizures along with a series of other medical problems. There is no evidence in the record that Omar had ever experienced a seizure prior to placement with Davis. He was hospitalized repeatedly for his medical conditions, which his foster sister's affidavit attributes to Joanne Davis' mistreatment. Gloria Babcock even made a notation that Omar was having seizures and indicated her awareness of his other medical problems. In spite of this

knowledge, her reports recklessly indicate that Omar was adjusting well to the foster family and his new environment.

The court goes on to state that there is "no evidence that any of the physicians who treated Omar suspected these illnesses resulted from abuse [prior to Omar's adoption]." This is in contradiction to the district court's findings and the evidence. In December of 1990, about one month before the approval of Omar's adoption, Dr. Villa Diego discovered old and new belt marks on Omar's back leading the physician to suspect abuse. Those looped marks were documented by Dr. Fahy at Arnold Palmer Hospital three days later, and he too expressed his worries especially regarding the responses given by Davis. Omar was not even interviewed concerning the belt marks. That conduct was objectively reckless, and the Defendants should not escape liability by claiming ignorance of the obvious.

In this case the cumulative effect of the officials' actions and inaction clearly satisfies the heightened culpability requirement, even if "deliberate indifference" is the applicable standard. At the very least, a jury issue was presented. This Court should grant this petition and resolve the conflicts between the circuits and the state supreme courts on this important issue.

CONCLUSION

This Court should grant the petition and resolve the important question of the mental state necessary to support a section 1983 action by an abused foster child.

Respectfully submitted,

By: _____

ROY D. WASSON
Florida Bar No. 0332070
Counsel of Record

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-15003

D.C. Docket No. 02-01063-CV-ORL-19-KRS

OMAR, by and through his
next friend James Kelaher,

Plaintiff/Appellant,

versus

GLORIA BABCOCK,
CINDY MORALES,
RAUL MORINGLANE, JR.,
BRUCE ROWLEY,

Defendants/Appellees.

Appeal form the United States District Court
for the Middle District of Florida

(April 18, 2006)

Before EDMONDSON, Chief Judge, ANDERSON, and FAY, Cicuit Judges.

PER CURIAM:

This is an appeal from the district court's grant of summary judgment in favor of appellees in a civil suit for damages under 42U.S.C. §1983. Appellant, Omar, was placed in the home of his adoptive mother Joann Davis by the Florida Department of Children and Families ("DCF"). He suffered abuse at the hands of his adoptive mother and now alleges that appellees, all at one time affiliated with Omar's case in DCF, were deliberately indifferent to the abuse that was occurring in Omar's home and therefore not entitled to a qualified immunity. The controlling issue in this case is whether appellees had actual knowledge of abuse, and whether appellees acted with deliberate indifference toward the abusive situation in appellant's household. We agree witht eh district court's ruling that the record contains insufficient evidence of deliberate indifference on the part of appellees.[1] We therefore affirm the summary judgment.

I. Background

Appellant, Demetrius Omar Jurineack ("Omar"), was taken into custody by the foster care unit of the Florida Department of Children and Family Services ("DCF")[2] on January 16, 1988, after he was abandoned by his birth mother. The events which Omar complains in this case occurred between November 1989 and June 23, 1993, and when he lived with his foster care,a nd

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[1] The district court entered a lengthy and detailed analysis of the evidence in this matter under date of August 27, 2004.

[2] At the time, it was called the Department of Health and Rehabilitative Services.

later adoptive mother, Joann Davis. However, the events described below begin with Omar's first placement afgter he was taken into custody of DCF.

Omar was first placed temporarily with Joyce Bailey ("Bailey"). Omar's brother, Jamaal, was also taken into custody in January 1988, and the two boys were placed in separate shelter foster homes while the foster care counselor attempted to locate relatives who could care for them. The record reflects that in April of 1988, Bailey reported that Omar was jealous, fought with other children, and was a "monster". Omar was then placed in a shelter home with Vassie Wiggins ("Wiggins"). Wiggins reported that Omar cried frequently, undressed himself during the night, refused to sleep with his pajamas on, was afraid of strangers, and had a withdrawn personality. She stated that his sleeping habits could explain his continued congestion. In September of 1988, Wiggins expressed concern about Omar's continuous water consumption and suspected that he might be diabetic.

In November of 1989, Omar was placed by DCF in the foster care of Joann Davis ("Davis"). Appellee, Gloria Babcock ("Babcock") was the DCF adoption counselor assigned to Omar's case. Babcock had met Davis previously during a training session which prepared foster parents to care for special needs children. Prior to Omar's placement, Davis had been a foster parent to a 13-year old girl named Melissa. Melissa had been sexually abused, thus, Davis was required to attend the special training in order to foster her. Melissa's placement did not work out and Melissa was ultimately removed from the home.

Babcock conducted a home study, completed on August 4, 1988. The study reflected that Davis had experience taking care of younger children, but that at the time she fostered Melissa, Davis did not wish to parent a younger child. In addition, DCF obtained three reference letters for Davis, all of which were positive. An investigation of her employment and her level of

income indicated that she had adequate life and medical insurance, her marital status was verified, the home visit indicated that the living arrangements were appropriate, a physician's report indicated normal physical findings, and finally, abuse registry and police checks indicated that she did not have a criminal history or a history of abuse.

Davis later advised Babcock that she would like to adopt a younger child, Vernetta. Although she expressed a commitment to Melissa, who remained in counseling for sexual abuse suffered prior to her placement, Davis also felt that parenting Melissa did not give her the nurturing experience she could get from parenting a younger child. Babcock conducted a second adoptive home study on February 3, 1989. Babcock obtained three references for Davis since Melissa had been placed with her, and each stated that Davis was an excellent parent who was capable of parenting two children. Police and abuse registry checks again came back negative. Babcock concluded that Davis had demonstrated that she was capable of caring for both children.

Davis later contacted DCF in May of 1989 requesting that Melissa be removed from her home. Apparently, Melissa had been acting out sexually, and Davis felt Melissa had disrespected her church by taking a boyfriend into the back of the church. Davis also reported that Melissa was talking back and would not obey. The adoption counselor offered counseling, as no placement for Melissa was immediately available. The record indicates that Melissa and Davis were trying to work out their differences, however, Melissa ultimately left the Davis home.

In June of 1989, with Babcock acting as the adoption counselor, Omar was placed in the Davis home along with his brother, Jamaal, and an unrelated girl renamed Keisha. No home study for this placement has been identified in the record, however, Babcock remained in regular contact with Davis and Omar over the fourteen months she was assigned to his case.

The record indicates that in sum, Babcock conducted home visits with Davis and the children in March, April, May, August, September, October, and November of 1990, and in January of 1991. The reports from her home studies indicate that in general, the children were doing well, that they remained in counseling, and that the family members were adjusting well to living with each other. Babcock noted that Davis had difficulty finding after hours care for the children. She also noted that Omar had been hospitalized for seizures and that he was referred to CMS on May 7, 1990.

On September 12, 1990, DCF officials Gloria Babcock, Cindy Morales ("Morales"), and Bruce Rowley ("Rowley") attended an Administrative Review Conference. The conference report indicated that DCF intended to follow through on Davis' adoption of Omar. In December of 1990, a suspicion that Omar had been abused was raised and documented in a Child Protection Team Report ("CPT report"). Specifically, on December 21, 1990, Omar was admitted to Arnold Palmer Hospital for treatment of pneumonia.[3] Omar was examined by Dr. Villadiego, who discovered a series of loop marks on Omar's body. Dr. Villadiego was concerned that these marks might have resulted from abuse, and he informed DCF of his discovery. Later that same day, Child Protection Team Case Coordinator Bubba Martin spoke with Davis, who said that she had not noticed the marks on Omar until Dr. Villadiego pointed them out. At the time, Davis could not explain where the marks came from. However, when Davis spoke with Dr. Fahy, a Child Protection Team physician, on December 24, 1990, Davis reported that the marks were caused when Omar's 11-year old brother hit him with an electrical cord.

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[3] Apparently this was Omar's second visit to the hospital in December, as he was admitted earlier that month following a seizure.

DCF assigned appellee Raul Moringlane, Jr. ("Moringlane") to investigate Omar's alleged abuse. Moringlane testified that he had no independent recollection of the case, which was assigned to him some thirteen years before his testimony. However, Moringlane conjectured that, because the DCF report regarding this incident could not be found, the report must have considered the allegations "unfounded" based upon Moringlane's investigation. Moringlane testified that "unfounded" reports were routinely destroyed at the time he would have investigated Omar's case.

In January of 1991, Babcock conducted another home visit to the Davis home and found that Davis and the children were doing well. Appellee, Bruce Rowley ("Rowley"), the Adoptions Supervisor, subsequently signed a Consent to Adoption dated January 16 1991. Davis adopted Omar on February 28, 1991, along with his biological brother and an unrelated girl.

The following evidence of abuse to Omar in the Davis home came to light after his adoption in February of 1991. On October 24, 1991, a report of child abuse in the Davis home was made to the Florida Protective Services System. The report was closed without classification. In December of 1992, Davis filed a Missing Persons report when the three children left home. In January of 1993, two reports of child abuse in the Davis home were made to the Orlando Police Department, one on January 14, 1993 and again on January 29, 1993.

On February 11, 1993, the Children's Home Society referred Omar to Lakeside Alternatives, Inc. for a psychological evaluation. During the evaluation, Davis said that Omar was obstinate, lied frequently, drank out of the toilet, and stole food. He was having behavioral problems in school and had difficulty controlling his anger. On one occasion, he had attempted to stab his eight-year-old sister. The psychological evaluation stated that Omar was depressed and emotionally deprived, and it recommended counseling for Omar and Davis. The report contained no reference to child abuse.

On May 4, 1993, another report of child abuse in the Davis home was made to the Florida Protective Services System. On June 23, 1993, Omar and his two siblings were removed from the Davis home and placed in DCF shelter care. While in shelter care, the children revealed that abuse was ongoing in the Davis home since autumn of 1989. They said that Davis did not provide them with sufficient food and often left them alone at night. Other incidents included forcing the children to sleep in the garage, tying them to the bedpost, locking them in an animal cage, forcing them to eat feces and vomit, and hitting them. None of the parties dispute that there is evidence of abuse to Omar post-adoption.

Linda Radigan, a former DCF official, served as an expert witness for the plaintiff. Radigan worked at the Florida DCF central office from 1992 to 2002. Her affidavit alleges various deficiencies in the procedure followed in placing Omar with Davis. Radigan states that DCF officials failed to follow departmental policies.[4] She states that DCF failed to conduct a home study of the Davis home prior to Omar's placement, and that the files did not contain sufficient documentation to show how Omar and his brother were chosen for Davis. She further opines that DCF failed to train, evaluate, and prepare Davis to care for the three children. Radigan further testified that appellees missed signs of abuse, such as Omar's declining health, the loop marks found on his body, and the power struggles between Omar and Davis documented by Davis' psychologist, Dr. Freeman. She states that this information would have been conveyed to appellees Babcock and Rowley through routine DCF procedures. Finally, Radigan testifies that the observance of loop marks could not be classified as unfounded because even if one child was injured by another

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[4] Radigan does not cite to these policies or state when they were in effect.

child, the parent is still responsible for failing to protect the injured child.

Omar filed suit in district court on September 12, 2002, alleging that appellees Moringlane, Rowley, Morales, and Babcock violated *42 U.S.C. § 1983* by depriving Omar of his constitutional right to be free from unwanted abuse in his foster care and adoption placement with Davis. Appellees moved for summary judgment. They also moved to strike Radigan's affidavit, along with the depositions of Barbara Holmes, a DCF foster care specialist, and Joan Adkins Lindsey. The district court entered an order striking portions of the affidavit and granting the motion for summary judgment. Omar now appeals.

II. Discussion

We review a district court's grant of summary judgment *de novo*, viewing evidence in the light most favorable to the opposing party. *Kerr v. McDonald's Corp.*, 427 F.3d 947, 951 (11th Cir. 2005). The issue before us is whether appellant has provided sufficient evidence of deliberate indifference to defeat appellees' assertion of qualified immunity.[5] The appellees are

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[5] Appellant also argues that the district court erred by striking portions of an affidavit provided by plaintiff's expert, Linda Radigan. This argument is entirely without merit as the stricken statements contain legal conclusions as to whether appellants acted with deliberate indifference.

Federal Rule of Evidence 702 allows for the presentation of expert testimony, however, if the jury does not need the assistance of an expert to understand the case, or if the witness simply recounts the facts and then offers an opinion as to the conclusion which the jury should reach, such expert testimony is not permitted. See *Montgomery v. Aetna Casualty & Surety Co.*, 898 F.2d 1537, 1541 (11th Cir. 1991). Moreover, a plaintiff cannot rely on legal conclusions articulated by an expert to meet his burden of coming forward with relevant evidence. See *Avirgan v. Hull*, 932 F.2d 1572,

not subject to this damage suit unless the record contains evidence that they (1) actually knew of a risk of serious harm; (2) recklessly disregarded that risk of harm; and (3) their conduct was more than merely negligent. See *Ray v. Foltz*, 370 F.3d 1079, 1083 (11th Cir. 2004); see also *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987)("A child abused while in foster care, in order to successfully recover from state officials in a *Section 1983* action, will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home"). We conclude that the record contains insufficient evidence of deliberate indifference, and that the court's grant of summary judgment was appropriate.

The record contains no evidence that appellees knew of a risk of serious harm to Omar. To be deliberately indifferent, an official must not only be aware of facts suggesting a substantial risk of serious harm to the plaintiff, but the official must also draw the inference that the plaintiff is likely to be harmed. See *Ray*, 370 F.3d at 1083 (citing *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)). The record contains evidence that, prior to Omar's adoption, he had some documented illnesses, he displayed evidence of psychological problems, and on one occasion, his doctor discovered loop marks on his body. There is no evidence, however, that any of the appellees actually drew the inference that these facts meant

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1577 (11th Cir. 1991).

As the district court noted, Radigan was not qualified as an expert on the state of mind of others. Several paragraphs of her testimony stated conclusions such as, "the defendants consciously disregarded known signs of abuse," and "absence of the required planning... demonstrates reckless disregard." Thus, we find no error in the court's decision to strike the portions of Radigan's testimony which contain legal conclusions as to another person's state of mind.

Omar was being abused by Davis. In fact, the only evidence is to the contrary.[6] Moreover, there is no evidence that any of the physicians who treated Omar suspected these illnesses resulted from abuse. Appellees would therefore have no reason to suspect otherwise. Thus, there is no evidence that appellees actually knew or even suspected that Omar was being abused prior to his adoption by Davis.

There is also no evidence that appellees recklessly disregarded a risk of harm to Omar or acted in a manner that was more than merely negligent. "Deliberate indifference is not the same thing as negligence or carelessness," *Ray*, 370 F.3d at 1083. Moreover, mere failure to follow DCF policy by gathering certain information does not rise to the level of deliberate indifference. See *Id.* at 1084-85. Instead, the plaintiff is required to provide evidence that the defendants deliberately disregarded actual knowledge of abuse. *Id.*

There is no evidence that any of the appellees' failure to conclude that Omar was being abused was anything other than an unfortunate miscue. The fact that Moringlane may have determined incorrectly that Davis was not abusing Omar is insufficient to support a finding of deliberate indifference. Moreover, Babcock's possible failure to conduct a home study prior to Omar's placement with Davis does not rise to the level of deliberate indifference. Babcock is not certain whether she actually conducted the home study in question, and the study is not in the record. The record does show, however, that Babcock was familiar with the Davis household, that she maintained regular contact with the family, and that she conducted studies of the Davis home on several other occasions while Omar was

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[6] According to Moringlane's testimony, the report of a suspicion that Davis was abusing Omar was determined "unfounded." There is no evidence that anything other than an unfounded report was filed.

under her supervision. There is no evidence that Babcock suspected at any point that Davis was abusing Omar, that she deliberately disregarded a known risk to Omar, or that she deliberately failed to learn of his abusive situation. Thus, even assuming that Babcock was required to conduct a home study specific to Omar prior to his placement and that she failed to do so, her failure to follow that particular DCF policy would not amount to deliberate indifference.

As for appellants Morales and Rowley, they had only supervisory authority over the situation and therefore had a more limited view of Omar's situation. The only information to which they potentially had access was Babcock's reports and the December 1990 CPT report. Since neither Babcock nor Moringlane indicated any suspicions of abuse to their supervisors, they would have no reason to believe otherwise given their lack of direct contact with the Davis household. Moreover, Morales and Rowley cannot be implicated based solely upon their supervisory authority. See *Miller v. King*, 384 F.3d 1248, 1261 (11th Cir. 2004)("It is well established in this circuit that supervisory officials are not liable under §1983 for the unconstitutional acts of their subordinates on the basis of respondeat superior")(internal quotations and citations omitted). Thus, there is insufficient evidence that Morales and Rowley acted with deliberate indifference with regard to the appellant.

III. Conclusion

As noted by the district court, Omar's history is indeed a tragedy, and one that begins at a very young age when he was first abandoned by his birth mother. The likelihood that Omar was abused by his adoptive mother, Davis, is truly an unfortunate circumstance. However, this is a case about whether or not the officials in charge of Omar's well-being while he was in foster care acted with deliberate indifference toward a situation which they knew to be an abusive one, and

the answer to that is no. Appellant has not met the burden of showing that appellees acted with deliberate indifference. There is simply no evidence in the record that any of the appellees actually considered Omar's situation in the Davis home to be an abusive one prior to his adoption, or that they deliberately disregarded any knowledge of abuse to Omar. We therefore affirm the district court.

AFFIRMED.

OMAR, by and through his next friend,
KEVIN CANNON, Plaintiff,

vs.

JOAN LINDSEY, GLORIA BABCOCK,
BARBARA HOLMES, DORIS MALAVE, CINDY
MORALES, RAUL MORINGLANE, JR.,
BRUCE ROWLEY, and JANICE YAHNKE, Defendants.

CASE NO. 6:02-CV-1063-ORL-19KRS

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

243 F. Supp. 2d 1339; 2003 U.S. Dist. LEXIS 6580

January 14, 2003, Decided

Background

In his lengthy complaint, Plaintiff, a minor child, alleges that at age fourteen months he was placed in inappropriate foster care by Defendants, all of whom were at all relevant times employees of the State of Florida's Department of Children and Families ("DCAF"). He also alleges that Defendants permitted him to be adopted by an abusive parent. He claims that Defendants' gross dereliction of duty as officers of the state resulted in a childhood of unremitting and intense abuse, often what can only be described as outright torture. Indeed, the complaint depicts plainly criminal maltreatment, from beatings to the unconscionable use of tear gas on children. Plaintiff has brought suit against Defendants in their individual capacities under the fourteenth amendment, arguing that they

collectively violated his constitutional right to reasonably safe foster and adoptive care.

Standard of Review

For the purposes of a motion to dismiss, the Court must view the allegations of the complaint in the light most favorable to Plaintiff, consider the allegations of the complaint as true, and accept all reasonable inferences therefrom. *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1532, 1534 (11th Cir. 1994); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). Furthermore, the Court must limit its consideration to the pleadings and written instruments attached as exhibits thereto. *Fed R. Civ. P.* 10(c); *GSW, Inc. v. Long County, Ga.*, 999 F.2d 1508, 1510 (11th Cir. 1993). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiff can prove no set of facts that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957).

Analysis

1. Qualified Immunity

Defendants, all of whom are being sued in their individual capacities, raise the defense of qualified immunity. They aver that Plaintiff had no "clearly established" right to be free of the sort of abuse he endured because the only relevant foster care case, *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), concerned different, albeit similar, facts. Defendants contend, in other words, that they were on notice only that it is constitutionally wrongful to allow a foster mother to bludgeon her foster child into a permanent coma, which is what happened in *Taylor*. *Taylor*, they argue, did not forewarn them that they would be liable when, with deliberate indifference, they stood by while Plaintiff's foster mother whipped him, starved him, left him chronically dehydrated, gassed him with mace,

neglected his severe illnesses (inflicted by her abuse), tied him up like a farm animal, and forced him to live squalidly in animal filth. In raising this defense, Defendants urge the Court to give qualified immunity doctrine its most expansive possible interpretation, arguing that civil servants will be unwilling to undertake their often difficult and vital work unless they have the protection of robust immunities. Doc. No. 23, 2.

The Supreme Court has held that a qualified immunity analysis consists of two distinct strands. First, the Court must evaluate the complaint to determine if its allegations, assuming they are true, plead a cognizable violation of the constitution. See *Saucier v. Katz,* 533 U.S. 194, 201, 150 L. Ed. 2d 272, 121 S. Ct. 2151 (2001). If this is answered in the affirmative, the Court pursues the second inquiry, which is to determine whether the right in question was clearly established. *Ibid.* This is not, however, a broad rumination on the law. Instead, it is a careful examination of the facts at hand, one that asks "whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Id.* at 202. See *Wilson v. Layne,* 526 U.S. 603, 615, 143 L. Ed. 2d 818, 119 S. Ct. 1692 (1999) (stating that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established.").

A. Was There A Constitutional Violation?

The pleadings do allege a constitutional violation. [1] There is no question that foster children have a fourteenth amendment liberty interest in physical safety, including a freedom from the sort of shocking abuse Plaintiff endured. See *Taylor* at 794-

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[1] The analysis of whether a constitutional right was violated applies to all Defendants equally. In the interest of brevity, the Court has chosen not to analyze each count against each defendant individually.

795. The facts of *Taylor* are similar to the allegations in the instant case. County and state officials removed a toddler from her natural parents and placed her with a foster mother. While in the foster home, however, the child was subjected to such merciless abuse at the hands of her guardian that she was left comatose. The Eleventh Circuit reasoned that foster care was analogous to involuntary custody in a state mental institution, which had previously been held by the Supreme Court to be a setting that implicates the fourteenth amendment. See *Youngberg v. Romeo,* 457 U.S. 307, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). The maltreatment of a foster child, in other words, violates his or her constitutional rights if, had the maltreatment in question occurred in a traditional custodial context such as a prison or mental facility, it would have violated an inmate's rights. According to the complaint, Plaintiff was brutalized with, *inter alia,* beatings, persistent malnourishment, dehydration, neglected illness, mace, and being bound. The depravity of this abuse plainly brings Plaintiff's case within the ambit of the *Taylor* doctrine, and the Court concludes, therefore, that the complaint satisfactorily pleads a fourteenth amendment violation.

Liability will attach, however, only if the unconstitutional injuries were proximately caused by the deliberate indifference of officials to known risks. Omissions or nonfeasance, in other words, can only be the predicates for liability if officials fail with deliberate indifference to fulfil a statutory or other duty to act. *Taylor* at 796. The complaint in the instant case repeatedly alleges that Defendants knew that Plaintiff was being egregiously abused and time after time did nothing to rescue him.[2] Furthermore, contrary to Defendants contention,

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[2] Defendants argue that Plaintiff's complaint is ambiguous with respect to when Defendants learned of the abuse, failing to state that Defendants knew of the abuse while it was occurring. While the

Plaintiff's complaint does not allege mere negligence, which, Defendants correctly point out, does not offend the Constitution. Instead, it adequately pleads the elements of deliberate indifference, as enunciated by *McElligott v. Foley,* 182 F.3d 1248 (11th Cir. 1999). Assuming the facts in Plaintiff's complaint to be true, it is beyond doubt that the deliberate indifference of Defendants to Plaintiff's continuing peril was a proximate cause of his injuries, thereby transforming his foster mother's criminal abuse into a constitutional tort for which state actors may be held liable.

B. Was The Right In Question Clearly Established?

As suggested earlier, the mere fact that *Taylor v. Ledbetter* establishes that foster children have a liberty interest in being free of harsh abuse does not correlatively mean, with no further analysis, that this right was "clearly established" at the time in question.[3] The Court must examine the complaint's factual

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Court agrees that this is a crucial material fact for this litigation to resolve, it is not something that Plaintiff needs to prove or allege with unreasonable specificity in his complaint. At the motion to dismiss stage, this sort of factual ambiguity, to the extent that it even exists, must be construed in Plaintiff's favor.

[3] Defendants suggest in their memorandum that *Taylor* cannot be used as the basis of a qualified immunity analysis because the Eleventh Circuit explicitly noted that its opinion does not address the applicability of a qualified immunity defense. Doc. No. 23, p. 10. It does not follow from what the appellate court wrote, however, that *Taylor* would have been decided differently had the defendant in that case asserted a qualified immunity defense, and, therefore, that *Taylor* can never be used in a case in which the defendant invokes qualified immunity. *Taylor* simply stands for the proposition that foster children have a fourteenth amendment liberty interest in safe and secure foster care. The question of qualified immunity is

allegations and determine whether reasonable officers in the position of Defendants would have understood that their conduct violated a clearly established right.

Defendants assert that they are entitled to qualified immunity unless the allegations in the instant case are essentially indistinguishable from the facts of *Taylor*. They contend that Eleventh Circuit decisional law has repeatedly emphasized that a government actor does not have adequate notice that her conduct is wrongful unless precedent with an identical fact-pattern has unambiguously declared it to be so. Doc. No. 23, pp. 7-13. Unsurprisingly, this stringent test was satisfied only in the rarest of circumstances, and § 1983 litigants in the Eleventh Circuit have generally found qualified immunity to be a nearly insuperable obstacle.

This, however, is no longer the law. Last spring, the Supreme Court handed down a decision that clarifies how a court is to determine whether a particular right was "clearly established" for the purposes of a qualified immunity analysis. In *Hope v. Pelzer*, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002), the Supreme Court overruled the Eleventh Circuit, holding that its exacting qualified immunity doctrine was too strict. In *Hope*, an Alabama prisoner sued three prison guards in their individual capacities, alleging that they violated his eighth amendment right to be free of cruel and unusual punishment when they left him handcuffed to a metal pole for hours with neither water nor respite. Even though it concluded that this abhorrent maltreatment indeed violated the eighth amendment, the Eleventh Circuit granted summary judgment to the guards on the ground that they were not on notice that such conduct was unconstitutional because circuit precedent had never addressed this specific fact-pattern.

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adjudicated under an entirely different line of cases.

In considering this decision, the Supreme Court ruled that salient cases like *Gates v. Collier,* 501 F.2d 1291 (5th Cir. 1974), furnished the guards with sufficient notice even though the facts in *Gates* were not perfectly congruent with the facts in *Hope.* This analytical flexibility reflects a deeper elaboration of what the Supreme Court meant in *United States v. Lanier,* 520 U.S. 259, 271, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) when it wrote that "general statements of the law are not inherently incapable of giving fair and clear warning." The germane issue in a qualified immunity analysis, in other words, is not whether there is factually identical precedent [**11] but, instead, whether "in light of preexisting law the unlawfulness [of the alleged conduct is] apparent." *Anderson v. Creighton,* 483 U.S. 635, 640, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987); see also *Mitchell v. Forsyth,* 472 U.S. 511 n. 12, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (stating that a governmental actor is not necessarily protected by qualified immunity just because the specific conduct in question has not previously been declared unconstitutional).

Plaintiff's fourteenth amendment right to be physically secure was "clearly established" at all relevant times. *Taylor* established the proposition that foster children have a liberty interest, pursuant to the substantive due process clause of the fourteenth amendment, in physical safety. It is absurd to argue that the facts of *Taylor,* with its whirlwind of violent abuse, insufficiently notified Defendants that the sort of willful indifference at the heart of this case was unconstitutional. Indeed, it taxes the powers of the Court's imagination to fathom what would violate the constitution if not deliberate indifference to the gruesome and unfettered torture of a helpless little boy like Plaintiff. Defendants, in essence, are in the awkward position of arguing that even though they were idle while Plaintiff was subjected to obscene abuse, including being maced and starved, they would have stepped in had the mother begun to pound him into a permanent coma because, after all,

beating toddlers into a coma is what the constitution, as explicated by *Taylor*, prohibits.

As the Supreme Court explained in *Hope*, however, our constitutional jurisprudence is not so bereft of good sense and flexibility that decisions in one case do not apply under similar but nevertheless different facts in another. Assuming the factual allegations of Plaintiff's complaint to be true, the Court concludes that Plaintiff had a "clearly established" right not be brutalized the way in which he alleges he was, and, therefore, that Defendants cannot assert a defense of qualified immunity at this stage.

2. Does the Complaint Meet the Heightened Pleading Requirements of a § 1983 lawsuit?

Despite the lenience of the Federal Rules of Civil Procedure, it is axiomatic that defendants remain entitled to know exactly what claims are being brought against them. See Fed R. Civ. P. 8 & 10. Where the specter of frivolous or retaliatory litigation is high, courts sometimes impose heightened pleading requirements to ensure that potential defendants are not deterred from engaging in socially beneficial activity. Such is the case with § 1983. As Defendants point out, the Eleventh Circuit requires § 1983 plaintiffs to fulfill a higher standard of specificity in their complaints. See *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir) (citing *Arnold v. Bd. of Educ.*, 880 F.2d 305, 309 (11th Cir. 1989); *GJR Investments, Inc. v. County of Escambia, Florida*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("Some factual detail in the pleadings is necessary ... in cases involving qualified immunity, where [the Court] must determine whether a defendant's actions violated a clearly established right.").

While mindful of this standard, the Court finds as a matter of law that Plaintiff's complaint satisfactorily pleads what is required. Defendants argue that Plaintiff's complaint evinces

three defects that courts have repeatedly condemned. First, Defendants contend that Plaintiff simply alleges the violation of general or abstract constitutional rights. Doc. No. 23, p. 13. This, however, is not true. Plaintiff specifically alleges that each Defendant violated his fourteenth amendment liberty interest, as articulated by *Taylor,* to have a physically secure environment while in foster care. Second, Defendants claim that Plaintiff's conclusory allegations "render it nearly impossible for the district court to conduct the 'fact-sensitive' examination of controlling caselaw required by qualified immunity." Doc. No. 23, p. 14. Whatever ambiguities might arise in more complex cases, the Court did not encounter any inordinate problems in determining that the allegations of the instant case fell within the compass of *Taylor.* Finally, Defendants argue that Plaintiff's "vague and conclusory allegations render nearly impossible the task of assessing how the qualified immunity defense applies to *each* individual defendant, as the district court is required to do." *Ibid.* Given that the constitutional claim against each Defendant is framed as a separate count, the Court was able to ascertain the nature of each claim and evaluate whether its allegations were sufficient to overcome the qualified immunity threshold. Upon careful consideration, the Court concludes that each count alleges a cognizable constitutional violation of a clearly established right under the substantive due process clause of the fourteenth amendment.

3. Has the Statute of Limitations Expired?

The applicable statute of limitations in a § 1983 lawsuit is the four-year Florida state statute of limitations for personal injuries. See *Wilson v. Garcia,* 471 U.S. 261, 276, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) (stating that state statutes of limitations for personal injuries govern § 1983); *Baker v. Gulf & Western Industries, Inc.,* 850 F.2d 1480, 1482 (11th Cir. 1988) (stating that Fla. Stat. Ann. § 95.11(3) provides for a

four-year limitations period for personal injuries). Defendants argue that virtually all of the allegedly unconstitutional conduct in the complaint occurred between 1989 and 1991, well outside the scope of the four-year period. As with all statutes of limitations, however, this one is subject to various exceptions, which toll its running. The salient question, therefore, is whether any applicable tolling provision applies.

It would be premature to dismiss the complaint because the applicable statute of limitations has run. While it is proper to grant a Rule 12(b)(6) motion if noncompliance with the statute of limitations is apparent on the face of the complaint, such is not the case here. See, e.g. *Bethel v. JendocoConstr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978). Both parties set forth fact-intensive reasons why the motion to dismiss on the basis of the statute of limitations should be granted or denied. Plaintiff argues that he was only recently aware that Defendants are responsible for his injuries, and that the relevant statute of limitations was thereby tolled until he made this discovery. Plaintiff also argues that Defendants concealment of their nonfeasance hampered the ability of Plaintiff to learn the full truth of what happened to him. Defendants, on the other hand, argue that Plaintiff ceased to be in their custody once he was adopted in the early 1990s, thus extinguishing their constitutional responsibility for him. They also contend that none of the alleged torts were intentional, which precludes Plaintiff from invoking the expansive statute of limitations for abuse victims under Fla. Stat. Ann § 95.11(7). [4] In keeping

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[4] Defendants assert that Fla. Stat. Ann. § 95.11(7), which establishes a generous statute of limitations for the victims of childhood abuse, does not apply because Plaintiff's complaint does not allege any intentional torts. Doc. No. 23, pp. 18-19. Plaintiff does not raise the question of whether this statute provides him with any shelter so the Court declines to invoke it on his behalf, other

with the standard of review, the Court concludes that the statute of limitations issue cannot be resolved at this stage of the litigation because such resolution would depend either on facts not yet in evidence or on construing factual ambiguities in the complaint in Defendants' favor, which would be inappropriate.

4. Plaintiff's Additional Motions

Plaintiff has two additional motions pending. The first requested an enlargement of time within which to respond to Defendants' motion. Doc. No. 26. This motion is denied as moot. The second requested an opportunity for oral argument. Doc. No. 27. This motion is also denied as moot.

CONCLUSION

For the foregoing reasons, the Court rules as follows:

1. Defendants motion to dismiss (Doc. No. 22) is DENIED;
2. Plaintiff's motion for an enlargement of time (Doc. No. 26) is DENIED;
3. Plaintiff's motion for oral argument (Doc. No. 27) is DENIED.

DONE AND ORDERED at Orlando, Florida, this 14th day of January, 2003.

PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

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than to remark that the Court has already found that Plaintiff alleged "deliberate indifference" by Defendants to his grave predicament (without "deliberate indifference" there would be no constitutional violation). This "deliberate indifference" satisfies the state statutory definition of abuse. See Fla. Stat. Ann. § 39.01.

OMAR, by and through his next friend,
Kevin Cannon,

Plaintiff-Appellee,

versus

JOAN LINDSEY,
GLORIA BABCOCK, et al.,
Defendants-Appellants.

No. 03-10594 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

June 26, 2003, Decided
June 26, 2003, Filed

DISPOSITION: Affirmed.

COUNSEL: For Lindsey, Joan, Babcock, Gloria, Holmes, Barbara, Malave, Doris, Morales, Cindy, Moringlane, Raul Jr., Rowley, Bruce, Yahnke, Janice, Appellants: Smith, Peter N., Gurney & Handley, P.A., ORLANDO, FL.

For Omar, Appellee: Gievers, Karen A., Attorney at Law, Tallahassee, FL. Wasson, Roy D., Attorney at Law, Miami, FL.

JUDGES: Before DUBINA, MARCUS and FAY, Circuit Judges.

OPINION: PER CURIAM:

This is an interlocutory appeal from the denial of a motion to dismiss on the grounds of qualified immunity. The suit is filed on behalf of a child removed from his mother by personnel of the Florida Department of Children and Families. The complaint alleges constitutional violations under 42 U.S.C. § 1983 against these individuals. The gravamen of the allegations is that these individuals knowingly and deliberately ignored the physical, mental and emotional harm being caused this child by the intentional infliction of known cruel and unusual punishment that shocks the conscience of any reasonable person.

The ruling of the district court denying the motion to dismiss is affirmed for the reasons set forth in its ORDER of January 14, 2003 which is attached as an appendix.

APPENDIX

OMAR, by and through his next friend, KEVIN CANNON, Plaintiff, vs. JOAN LINDSEY, GLORIA BABCOCK, BARBARA HOLMES, DORIS MALAVE, CINDY MORALES, RAUL MORINGLANE, JR., BRUCE ROWLEY, and JANICE YAHNKE, Defendants.

CASE NO. 6:02-CV-1063-ORL-19KRS

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

January 14, 2003, Decided

OMAR, by and through his next friend,
Kevin Cannon,

Plaintiff,

-vs-

JOAN LINDSEY, GLORIA BABCOCK,
BARBARA HOLMES, DORIS MALAVE,
CINDY MORALES, RAUL MORINGLANE, JR.,
BRUCE ROWLEY, JOYCE SETARO
and JANICE YAHNKE, each individually,

Defendants.

Case No.: 6:02-cv-1063-Orl-19KRS

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION

2004 U.S. Dist. LEXIS 15510

July 30, 2004, Decided

OPINION: ORDER

This case comes before the Court on the following:

1. Defendants', Joan Lindsey, Gloria Babcock, Barbara Holmes, Doris Malave, Cindy Morales, Raul Moringlane, Jr., Bruce Rowley, and Janice Yahnke, Motion for Partial Final [sic] Summary Judgment on the Statute of Limitations (Doc. No. 59); Defendants', Joan Lindsey, Gloria Babcock, Barbara

Holmes, Doris Malave, Cindy Morales, Raul Moringlane, Jr., Bruce Rowley, and Janice Yahnke, Memorandum of Law in Support of their Motion for Partial Final [sic] Summary Judgment on the Statute of Limitations (Doc. No. 60); Plaintiff's Response to Motion for Partial Summary Judgment on the Statute of Limitations and in Response to the Defendants' Related Memorandum of Law (Doc. No. 64).

2. Defendants' Gloria Babcock, Cindy Morales, Raul Moringlane, Jr., and Bruce Rowley Motion for Partial Summary Judgment Based on *Deshaney v. Winnebago County* and Memorandum of Law in Support Thereof (Doc. No. 68); Plaintiff's Response in Opposition to Defendants' Combined Motion for Summary Judgment Based on *DeShaney* (Doc. No. 88).

Procedural History

On October 15, 2002, Plaintiff sued Defendants in their individual capacities alleging a deprivation of rights guaranteed by the fourteenth amendment. Doc. No. 18. Defendants promptly filed a motion to dismiss, arguing, *inter alia*, that they were entitled to qualified immunity. Doc. Nos. 22 & 23. This motion was denied and affirmed on appeal. Doc. Nos. 31 & 41. Following the close of discovery, the eight original Defendants filed a collective motion for summary judgment on the ground that Plaintiff's claims are barred by the statute of limitations. Doc. No. 59. This motion is presently before the Court.

Since that motion was filed, the parties stipulated to the dismissal of all claims against Defendants Holmes, Lindsey, Malave, and Yahnke. Doc. No. 65. The remaining four Defendants then collectively filed a motion for summary judgment contending that Plaintiff's claims are foreclosed by *DeShaney v. Winnebago County*. Doc. No. 68. This motion is also presently before the Court.

Along with the *DeShaney* motion, each of the four remaining Defendants individually filed motions for summary judgment on the ground of qualified immunity. Doc. Nos. 69, 71, 73 & 75. The Court will address those four motions in an order that will be forthcoming.

The Facts

The following is not a comprehensive summary of the record, just the facts necessary to resolve the two motions presently before the Court.

Plaintiff is a minor. He was born on November 24, 1986. Doc. No. 68, Ex. A. He was removed from the custody of his natural mother when he was still an infant. In November of 1989, he was placed in the foster care of Joann Davis. Doc. No. 78, Moringlane Depo., Ex. 37 "Predispositional Summary for Dependency." at 5. He was adopted by Davis, along with his biological brother and an unrelated girl, on February 28, 1991. Doc. No. 68, Ex. A. In the interval between his arrival in the Davis household and his adoption, there was evidence that Davis was mistreating her children. *See, e.g.*, Doc. No. 78, Ex. 37 (medical records of an exam conducted on December 21, 1990). The three children were removed from the Davis home on June 23, 1993. Doc. No. 78, Moringlane Depo., Ex. 37 "Predispositional Summary for Dependency." at 5. Defendant does not dispute that Plaintiff was the victim of horrible abuse at the hands of Davis.[1]

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[1] For example, as part of an investigation into the Davis household in the days leading up to the children's removal, they reported to an investigator of "being tied to a bedpost all night, having food and water withheld up to 3 days, being locked in an animal cage, forced to sleep in a dark garage alone, being tied together standing in Joann's doorway w/ their hands behind them all night, being forced to eat feces & vomit, being hit w/ fishing rod, hammer, frying pan, switch, shoes & sticks." Doc. No. 78, Moringlane Depo., Ex. 37, "Abuse Report" of Karen Loomis.

Standard of Review

Summary judgment is authorized "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 919 (11th Cir. 1993)(citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

Legal Analysis

1. The Statute of Limitations

Defendants move for summary judgment on statute of limitations grounds under three distinct theories. First, a cause of action under section 1983 is subject to Florida's four-year residual personal injury statute of limitations, meaning that Plaintiff can recover only for wrongs committed the four years prior to the July 10, 2002 filing date of this lawsuit. Defendants

further argue that the tolling provisions do not apply even though Plaintiff was a minor because a Florida court appointed a guardian ad litem for him after he was removed from the Davis household. Doc. No. 60 at 3-6. Second, even if the limitations period is tolled because Plaintiff was a minor, the statute of repose bars any cause of action brought more than seven years after the tortious act. *Id.* at 6. Finally, Defendants contend that the special statute of limitations for cases involving the intentional abuse of minors does not apply because Joanne Davis, not Defendants, was the intentional abuser. *Id.* at 7-10.

While Defendants are correct that section 1983 claims must comply with the personal injury statute of limitations of the forum state, *Owens v. Okure,* 488 U.S. 235, 250, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989), Defendants fail to address the even more pressing question of when Plaintiff's claims accrued. The state statute of limitations only begins to run when the underlying claims have accrued, and accrual is a question of federal, not state, law. *Rozar v. Mullis,* 85 F.3d 556, 561 (11th Cir. 1996) ("Federal law determines when a federal civil rights action accrues.") (citation omitted). "The general federal rule is that 'the statute [of limitations] does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights.'" *Id.* at 561-562 (quoting *Mullinax v. McElhenney,* 817 F.2d 711, 716 (11th Cir. 1987)).

Plaintiff, who was born on November 24, 1986, was in the abusive Davis household between the ages of two and six. It is self-evident that Plaintiff could not possibly have been cognizant of his rights following his removal from Davis' custody. Furthermore, the Court will not impute to his then-Guardian ad Litem, Pamela Foels, the legal duty to investigate and bring a constitutional cause-of-action on his behalf. The unrebutted affidavit of Ms. Foels, supported by a copy of a June 24, 1993 state court order, indicates that she was appointed

Guardian ad Litem solely for the purposes of a dependency proceeding, not to litigate Plaintiff's tort claims lest they be extinguished by June 24, 1997, five months before his eleventh birthday. Doc. No. 64, Ex. 1, Foels Aff. P3.

The undisputed evidence demonstrates that the first serious effort by a fiduciary of Plaintiff to pursue legal remedies on his behalf began in February of 2000 when Plaintiff's counsel, Karen Gievers, wrote the Department of Children and Families to request records and notify it of potential claims.[2] *Id.*, Ex. 3, Gievers Aff. P9. Ms. Gievers struggled with the DCAF for nearly two years before it finally relinquished records germane to Plaintiff's time in the custody of his adoptive mother. The Court, therefore, concludes as a matter of law that Plaintiff's claims did not accrue for the purposes of Florida's statute of limitations until at least November of 2001 when Ms. Gievers finally obtained the records that form much of the factual basis of Plaintiff's constitutional cause of action.

The complaint in this case was filed within eight or nine months of the accrual date for Plaintiff's claims, well within Florida's four-year statute of limitations.[3] Accordingly,

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[2] Toward the end of their motion, Defendants argue, implausibly, that in the early 1990s Plaintiff "knew who his abuser was and what type of abuse took place." Doc. No. 60 at 10. More interestingly, they aver that "Omar Davis has been a plaintiff in lawsuits which alleged the *same* abuses complained of in this case." If true, this fact may have altered the Court's analysis. There is no way for the Court to know, however, because Defendants provided no evidence to support this statement.

[3] Even if the Court were to conclude that the accrual date was in early February of 2000 when Ms. Gievers began to correspond with the Department of Children and Families, the complaint in this case was filed within two years.

Defendants' motion for summary judgment on statute of limitations grounds is denied.

2. *Deshaney v. Winnebago County*

Defendants contend that their liability is precluded by the doctrine set forth in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Doc. No. 68 at 3-4. In *Deshaney,* Joshua DeShaney, who as a four year old suffered catastrophic brain damage at the hands of his father, and his mother brought a section 1983 suit against the Winnebago County (Wisconsin) Department of Social Services ("DSS") and various employees individually because they failed to intervene when there was reason to suspect that Joshua was being abused by his custodial father. Winnebago County first learned of Joshua's situation when his father's second wife told police that the father was a child abuser. *Id.* at 191-193. DSS interviewed the father but pursued the case no further. *Id.* Over the course of the next two years, Joshua was in and out of the hospital with various injuries that his healthcare providers dutifully reported to DSS as indicative of abuse. *Id.* During this period, DSS left him in his father's custody despite mounting evidence, including the direct observation of head injuries by Joshua's caseworker, that he was being abused. *Id.* Joshua was hospitalized for the final time when his father beat him so severely that he was left with crippling brain damage. *Id.* The Supreme Court held that the substantive due process clause of the Fourteenth Amendment only serves to restrain the government from oppressing its citizens. *Id.* at 195 ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."). It does not impose upon the government a duty to protect one citizen from another. *Id.* ("[The Due Process Clause's] purpose was to protect people from the State, not to ensure that the State protected them from each other.").

Plaintiff's case is distinguishable from *DeShaney*.[4] The salient fact in *DeShaney*, which is not present in this case, is that neither Winnebago County nor its employees created little Joshua's predicament. Joshua was, so to speak, always in his natural and proper place. *Id.* at 262 ("While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). It was simply a terrible misfortune that his place within the natural order was in the custody of a heinous man.

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[4] The Court will treat Defendants' motion for summary judgment on *DeShaney* grounds strictly as a question of law, not fact. Defendants, who cite only to adoption records, not their own depositions, apparently believe there is no construction of the facts in the record, even as Plaintiff would have them, that is not foreclosed by *DeShaney*. The basis of this belief is their contention that the only abuse Plaintiff suffered occurred while he was the adoptive child of Joann Davis between February 28, 1991 and June 23, 1993. Doc. No. 68 P3. This is clearly wrong because, as the Court noted in the preceding summary of the facts, there is evidence that Davis abused Plaintiff while he was still in her foster care.

In any event, in making this decision not to cite their own depositions, Defendants implicitly concede that, for the purposes of their *DeShaney* motion, their various states of mind in the period preceding the adoption, when Plaintiff was in Joann Davis' foster care, are not relevant. For the purposes of this summary judgment only, the Court concludes that Defendants do not contest Plaintiff's interpretation of the record, only the legal implications thereof. The Court will take up the question of Defendants' intent more closely and with much reference to the record, as Defendants themselves do, in the pending motions for summary judgment on the ground of qualified immunity.

Plaintiff, on the other hand, was not in his place in the natural order when he was being brutalized by his adoptive mother. His place within the natural order was with his natural mother. DCAF, however, removed him from his mother's care when he was still an infant. Indeed, DCAF stripped him of his liberty and rendered him utterly dependent on the beneficence of its employees and agents. It was this seizure and sequestration of Plaintiff that gave rise to a constitutional duty to act as his fiduciary. *Id.* at 199-200 ("when the State takes a person into its custody and holds him there...the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.") (citation omitted); ***Omar*** *v. Lindsey,* 243 F. Supp. 2d 1339, 1343 (M.D. Fla. 2003) *aff'd* 334 F.3d 1246 (11th Cir. 2003) ("The maltreatment of a foster child...violates his or her constitutional rights if, had the maltreatment in question occurred in a traditional custodial context such as a prison or mental facility, it would have violated an inmate's rights."). Having seized Plaintiff, Defendants then facilitated his adoption by a foster mother who posed a clearly foreseeable risk to his well-being. 489 U.S. at 200 ("when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by...the Due Process Clause."). When they did this, Defendants put Plaintiff in an unnatural and improper place, a place he would never have been but-for their intervention under color of state law. Consequently, at least under one interpretation of the facts, *DeShaney* would not apply.

Defendants, to be sure, are not without a point. If Defendants in good faith, or even with mere negligence, first placed Plaintiff in foster care with Joann Davis and then facilitated his adoption by her two years later, then *DeShaney*

would apply because Defendants would have acted at all times as constitutionally sufficient stewards of Plaintiff during the time they deprived him of his liberty. [5] *Omar*, 243 F. Supp. 2d at 1343 ("Liability will attach...only if the unconstitutional injuries were proximately caused by the deliberate indifference of officials to known risks.") (citing *Taylor v. Ledbetter*, 818 F.2d 791, 796 (11th Cir. 1987)). If, however, Defendants first placed Plaintiff in foster care with Joann Davis and then facilitated his adoption by her, and they acted with deliberate indifference to grave and obvious risks, then their stewardship of Plaintiff's well-being did not adequately discharge the duty the constitution places on state actors when they assume control over a citizen's life. Thus, the crucial fact Plaintiff must establish at trial, and this issue will be addressed when the Court examines the pending motions for summary judgment on the ground of qualified immunity, is that Defendants exercised custodial control over Plaintiff while he was in foster care with Davis and they exercised this control with deliberate indifference to obvious dangers.[6]

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[5] Again, because the question of Defendants' intent is dispositive of the qualified immunity issue, the Court will examine Defendants' state of mind when it addresses the pending qualified immunity motions.

[6] Defendants' apparent position that DCAF employees could never be liable for injuries caused by an adoptive parent is absurd on its face. Suppose a DCAF caseworker, knowing that a prospective adoptive parent were a sexual predator, testified during an adoption proceeding that her investigation revealed no reason not to grant the adoption of a foster child in DCAF custody to the predator, and the judge, in reliance on this testimony, did so. Suppose further that the caseworker did this because she hated this particular child or just does not care one whit about what happens to

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment on the ground of the statute of limitations (Doc. No. 59) is DENIED.

Defendant's motion for summary judgment on the ground that liability is precluded by *DeShaney v. Winnebago County* (Doc. No. 64) is DENIED.

DONE and ORDERED in Chambers in Orlando, Florida this 30th day of July, 2004.

PATRICIA C. FAWSETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

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children after they are adopted. *DeShaney* does not stand for the proposition that the state is free to seize children and then, through malice or deliberate indifference, actively work to place those children in the adoptive hands of predators and other dangerous deviants.